IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 316 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

RAMESH CHOTHABHAI KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 316 of 2001

MR PRAVIN GONDALIYA for Petitioner No. 1

MR BD DESAI, APP for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 08/05/2002

ORAL JUDGEMENT

1. Heard ld. counsel Mr. Gondaliya for the petitioner-original accused and ld. APP Mr. B.D. Desai for the State.

2. The petitioner accused has challenged the legality and validity of the judgment and order dated 7.3.1996 passed by ld. Judicial Magistrate, First Class, (2nd Court), Junagadh in Criminal Case No. 5914/1991 holding the petitioner accused guilty for the offence punishable under Sections 354 and 452 of IPC and sentencing him to suffer S/I for One Year and to pay fine of Rs. 250/ I/d to further undergo S/I for 15 days for the offence punishable under Section 354 of IPC and sentencing him to suffer S/I for Two Year and to pay fine of Rs. 500/ I/d to further undergo S/I for One Month for the offence punishable under Section 452 of IPC. Ld. Magistrate, however, acquitted the petitioner accused of the offence punishable under Section 506(2) of IPC.

3. On the complaint being filed by the father of the victim girl Kantaben for the offences punishable under Sections 354, 452 and 506(2) of IPC, Criminal Case No. 5914/1991 came to be registered against the petitioner accused. The trial Court has considered the fact that victim girl Kantaben was all alone in the house in the noon and accused entered the house and behaved indecently with victim Kantaben. Ld. Magistrate has further observed while appreciating the evidence that there is no reason for the complainant or victim girl to implicate falsely the accused in such offence especially when both the parties are neighbours. It is also observed that in such type of cases, evidence of victim girl,if found trustworthy, than accused can be held guilty. Ultimately, considering the oral evidence of prosecutrix Kantaben and the complainant, ld. Magistrate convicted and sentenced the petitioner accused vide judgment and order dated 7.3.1996 as aforesaid.

4. Against the judgment and order passed by the ld. Magistrate, petitioner accused preferred appeal before the Court of Sessions being Criminal Appeal No. 9/1996. After hearing the ld. counsel appearing for the petitioner accused and ld. APP, ld. Addl. Sessions Judge, Junagadh, vide judgment and order dated 11.7.2001, partly allowed the criminal appeal and confirmed the order of sentence passed by the ld. Magistrate, but reduced the order of sentence. Ld. Addl. Sessions Judge, sentenced petitioner accused to undergo S/I for 3 months and to pay fine of Rs.250/, I/d to undergo further S/I for 15 days for the offence punishable under Section 354 of IPC and further sentenced to undergo S/I for 3 months and to pay fine of Rs.500/, I/d to undergo S/I for 15 days instead of One Month as ordered by the ld. Magistrate.

5. This judgment and order of the ld. Addl. Sessions Judge, Junagadh dated 11.7.2001 is brought under challenge by way of present Revision Application.

6. It has been argued by ld. counsel Mr. Gondaliya for the petitioner accused that the findings of both the Courts below are based on the acceptance of evidence of victim girl Kantaben and her father- complainant. Both these witnesses are interested witnesses and their evidence ought not to have been accepted. Time of incident was also relevant. Both the parties are neighbours. Age of the accused, at the relevant point of time, was around 16 years. Birth date of the boy is undisputedly 1.7.1976 and alleged incident had occurred in the month of September 1991. However, in response to the query raised by this Court, ld. counsel Mr. Gondaliya has submitted that he would concentrate his arguments on the point of award of sentence imposed by the trial Court and ultimately confirmed by the Sessions court and has not seriously challenged the order of conviction recorded by ld. Magistrate and confirmed by the Sessions Court, as it is the case of concurrent findings of fact and there is no material illegality in appreciating oral as well as documentary evidence. Ld. counsel Mr. Gondaliya has rightly not pressed the plea so far as recording of conviction is concerned.

7. Looking to the evidence, ld. Addl. Sessions Judge ought to have granted benefit of probation under Section 6 of the Probation of Offenders Act,1958 R/w Section 360 of CrPC in view of the tender age of the boy. He was a teenager at the relevant point of time. Anxiety in the mind of a young aged boy might have created such situation and ld. Addl. Sessions Judge ought not to have sentenced the petitioner accused sending him to prison for three months. Period of three months is not a short period and a young boy would turn out to be a hardened criminal. On perusal of R & P, it seems that neither the ld. Magistrate nor the ld. Addl. Sessions Judge had tried to call for report of Probation Officer. In view of the averments made in the memo of revision application, contents of judgment and other facts emerging from record, this Court felt that report of Probation Officer requires to be called for and so, this Court, vide order dated 1.4.2002, directed the ld. Sessions Judge, Junagadh to call for report from Probation Officer and to furnish the same to this Court. This Court, received the report from Probation Officer, Junagadh in connection with the crime mentioned in the present revision.

8. I have opened the report of Probation Officer from the sealed cover and on perusal thereof, it supports the case submitted by the ld. counsel Mr. Gondaliya for the petitioner accused that this is a case wherein the accused could have been and should be granted benefit of probation in exercise of powers under Section-6 of the Probation of Offenders Act, 1958.

9. The second submission of Mr. Gondaliya is that if the petitioner accused is not given benefit of probation, then atleast sentence already undergone by him should be considered as sufficient as he remained in jail for more than 14 to 15 days after confirmation of the order of conviction by the ld. Addl. Sessions Judge as it took around 14 to 15 days for obtaining bail from the appropriate Court. He has submitted that amount of fine has been paid.

10. According to ld. APP Mr. Desai for the State, a serious attempt has been made to see that either victim girl or complainant appears before the Court, but none has appeared. This offence being the offence compoundable with the permission of the Court in view of the scheme of Section 320 of CrPC, this exercise was made on the suggestion of the Court. However, attempt made by ld. counsel appearing for the applicant has failed and nobody appeared from the original complainant side. So, it can be inferred that the complainant or victim girl is not interested to compound the offence, otherwise, they could have compounded the same before the trial Court and accused could have been acquitted on such compromise.

11. The following facts lead this Court to reach to the conclusion that imprisonment already undergone by the petitioner accused be treated as "sufficient" :-

(i) when incident in question occurred, accused was a young boy approximately aged about 15 years;

(ii) incident had taken place at about 12.00 noon;

(iii) victim girl was in her house and was alone;

(iv) accused is residing in the neighbouring area, both belong to same community. There is, therefore, reason to believe that otherwise terms between two families may not be that bad so that entry of the accused in the house of the victim girl could be viewed very seriously;

(v) at the relevant point of time, undisputedly, the age of the victim girl was around 20 years. This fact is admitted by the complainant father also.

(vi) girl has specifically stated at the time of deposition that she is of 22 years of age, meaning thereby that on the date of incident, she must have completed 20 years of age;

(vii) the fact that girl was elder by 4 to 5 years than the accused and so tender aged boy, under some excitement might have committed the offence without any intention;

(viii) It is not in evidence that he is a hardened criminal nor he is involved in same or similar types of offence. Of course, the facts reflected in the report of Probation Officer, would be extraneous.

(ix) If the accused is sent to jail for the incident which had occurred in the year 1991 for some days, the same would also create undue and unreasonable hardships, not only to the accused, but to the complainant side residing in the neighbourhood of the accused.

(x) As per the accepted principle of penology, the effect of social impact of the conviction is also relevant and it would not be proper or otherwise legal to send accused in jail in all cases;

12. I am told by ld. counsel Mr. Gondaliya for the petitioner accused that victim girl Kantaben is now married and has settled in her in-laws house. It, therefore, seems that she had not opted to come forward and appear before the Court otherwise the offence could have been compounded, if she would have agreed.

13. Thus, there are more than one grounds on which this Court can hold that it would be in the interest of justice to sentence the petitioner accused to undergo sentence already undergone by him. Ld. counsel Mr. Gondaliya has fairly submitted that the petitioner would be satisfied if any of the aforesaid two reliefs is granted viz. (i) to grant probation, and/or (ii) to sentence the petitioner to suffer imprisonment already undergone. In the facts and circumstances of the case and for the reasons aforesaid, this Court feels that it would be in the interest of justice to accept the second submission of ld. counsel Mr. Gondaliya imposing

sentence upon the petitioner accused to suffer imprisonment already undergone by reducing the same.

14. For the reasons aforesaid, Criminal Revision Application is partly allowed. Impugned judgment and order dated 11.7.2001 passed by ld. Addl. Sessions Judge, Junagadh in Criminal Appeal No. 9 of 1996 is hereby modified and altered to the extent that order of conviction recorded by the ld. Addl. Sessions Judge against the petitioner accused including payment of fine, is hereby confirmed, but order of sentence awarded by the ld. Addl. Sessions Judge is hereby altered and reduced to the extent imprisonment already undergone by the petitioner accused.

15. Rule is made absolute accordingly. Yadi to the concerned Court.

8.5.2002 [C.K. BUCH, J]
*rawal